# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1739.

JAMES J. SLOCUM, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 30, 1891.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1890.

## No. 1739.

---

JAMES J. SLOCUM, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, NEW YORK.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Petition for writ of habeas corpus | 1 | 1 |
| Order denying writ | 4 | 2 |
| Appeal and allowance of same | 5 | 2 |
| Citation | 7 | 3 |
| Clerk's certificate | 9 | 4 |


27177

1 *To the judges of the circuit court of the United States for the southern district of New York.*

The petitioner, James J. Slocum, by Geo. A. Hooper, his attorney, respectfully showeth unto your honors that he is unlawfully imprisoned and restrained of his liberty contrary to law, and in violation of the Constitution of the United States, by Augustus A. Brush, as agent and warden of the State prison at Sing Sing, in the southern district of New York.

II. The facts concerning the detention and the claim or authority by virtue of which he is so detained are as follows:

He was convicted of the crime of murder in the first degree in the court of general sessions of the peace, in and for the city and county of New York, on the 21st day of March, 1890, and sentenced upon such conviction to death under chapter 489 of the laws of 1888, and committed to the custody of said Brush accordingly.

III. That when said Slocum was arraigned upon the indictment herein, he was without counsel and without means to employ counsel for his defense. That the judge presiding at said court then asked said Slocum if he desired counsel; and said defendant then relying upon his constitutional rights, demanded that counsel be assigned to defend him upon said trial as provided by law. That thereupon the said court assigned one John R. Heinzleman as counsel to defend him.

2 That said John R. Heinzleman was not then, nor at any time prior or since, an attorney or counsellor at law; and that he had no right to practice in said court of generel sessions, nor in the court of appeals of said States, in which court he prosecuted the appeal in this case from said court of general sessions.

That by reason of said assignment of a person not an attorney or counsellor at law, the defendant was denied and deprived of his rights under the laws of said State of New York and under the Constitution of the United States.

Your petitioner therefore says that the judgment and sentence in this case is void under the Constitution.

Your petitioner alleges that the committment aforesaid and the detention under the conviction and sentence aforesaid, and under said indictment, are null, void, and of no force or validity, and prays that this honorable court do forthwith issue the writ of habeas corpus to the said Augustus A. Brush, agent and warden as aforesaid, requiring him to produce the body of James J. Slocum before this court, at some time to be designated in said writ, then and there to abide what shall be awarded by said court in the premises.

And at the same time he prays your honors to issue out of said court the writ of certiorari to the said court of general sessions of the peace, and the clerk thereof, commanding it or him forthwith to certify to said circuit court of the United States true copies of the indictment,

3 judgment roll, orders, commitments, and warrants and objections, motions, certificates, and proceedings in said court remaining, under or by virtue of which said petitioner is now deprived of his liberty by authority of that court.

GEO. A. HOOPER,
*Att'y for Petitioner, 25 Chambers Street, N. Y. City.*

CITY AND COUNTY OF NEW YORK, *ss:*

Geo. A. Hooper, being duly sworn, says he is authorized by James J. Slocum, the petitioner herein, to make, sign, and verify the foregoing petition; that he has read the same and knows the contents thereof, and the same is true.

That the reason this petition is not verified by said Slocum is that he is in close and solitary confinement at said Sing Sing prison, and that the week fixed for his execution begins on Monday next, March 16th, and there is not time, therefore, to have him verify and serve the writ without endangering his life.

GEO. A. HOOPER,

Sworn to before me this 12th day of March, 1891.
[SEAL.] B. W. TRAITEL,
*Notary Public, N. Y. Co.*

(Endorsed:) U. S. circuit court. In re petition, etc., of James J. Slocum. Ex parte Slocum. Petition. Geo. A. Hooper, attorney for petitioner, 25 Chambers street, N. Y. City. U. S. circuit court. Filed Mar. 12, 1891. John A. Shields, clerk.

4 At a stated term of the circuit court of the United States for the southern district of New York, held in the city of New York on the 12th day of March, 1891, present, Hon. E. Henry Lacombe, circuit judge.

*In the matter of the application of James J. Slocum for a writ of habeas corpus.*

The petition of James J. Slocum having been duly presented to this court for a writ of habeas corpus to inquire into the cause of his detention at Sing Sing prison, in the southern district of New York, by Augustus A. Brush, agent and warden of said prison, and for relief in the premises:

Now, on reading and filing said petition and hearing Geo. A. Hooper, esq., counsel for said petitioner, it is ordered that the prayer of said petitioner be and the same hereby is in all things denied.

E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court. In re petition, etc., of James J. Slocum. Ex parte Slocum. Order denying writ. Geo. A. Hooper, attorney for petitioner, 25 Chambers street, N. Y. City. U. S. circuit court. Filed Mar. 12, 1891. John A. Shields, clerk.

5 In the circuit court of the United States for the southern district of New York.

*In the matter of the application of James J. Slocum for a writ of habeas corpus.*

The petitioner, in behalf of James J. Slocum, conceiving himself aggrieved by the final decision of this court declining to grant the writ of

habeas corpus herein, doth hereby appeal therefrom to the Supreme Court of the United States; and he prays that his appeal may be allowed and that a transcript of the record herein may be sent to the Supreme Court.

Dated New York, March 12th, 1891.

GEO. A. HOOPER,
*Atty for Petr., 25 Chambers St., N. Y. City.*

The foregoing appeal is hereby allowed, and the clerk of this court is hereby directed to certify and send to the Supreme Court of the United States forthwith a transcript of the petition, decision, order thereupon, and of this appeal.

Dated New York, March 12th, 1891.

E. HENRY LACOMBE.

Due & timely service of the within order is hereby admitted.
Dated March 13, 1891.

A. A. BRUSH,
*Agent & Warden.*

6 (Endorsed:) U. S. circuit court. In re petition, etc., of James J. Slocum. Ex parte Slocum. Appeal and order allowing appeal. Geo. A. Hooper, attorney for petitioner, 25 Chambers street, N. Y. City. U. S. circuit court. Filed Mar. 16, 1891. John A. Shields, clerk.

7 By the Hon. E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

*The President of the United States to Augustus A. Brush, esq., agent and warden of Sing Sing prison in the State of New York, greeting:*

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden in the city of Washington, D. C., on the twenty-third day of March, 1891, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein James J. Slocum is appellant and said Augustus A. Brush, as agent and warden, is appellee, to show cause, if any there be, why the decision in the said appeal shall not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of New York, in the southern district of New York in the second circuit, on the 12th day of March, 1891, and of the Independence of the United States 115th.

E. HENRY LACOMBE,
*Circuit Judge.*

GEO. A. HOOPER,
*Atty. for Petn'r,*
*25 Chambers st., N. Y. City.*

8 (Endorsed:) U. S. circuit court. In re petition, &c., of James J. Slocum. Ex parte Slocum. Citation. Geo. A. Hooper, esq., atty. for petitioner, 25 Chambers st., New York City. Due & personal service of the within citation is hereby admitted. Dated March 13, 1891. A. A. Brush, agent and warden. U. S. circuit court. Filed Mar. 16, 1891. John A. Shields, clerk.

9 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages numbered from 1 to 9 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of James J. Slocum, appellant, against Augustus A. Brush, as agent and warden, appellee, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this nineteenth day of March, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

JOHN A. SHIELDS,
*Clerk.*

10 (Indorsed on back:) No. 1739. James J. Slocum, appellant, vs. Augustus A. Brush, agent & warden of Sing Sing Prison, New York. S. New York. C. C. U. S. Filed April 28, 1891.

# Supreme Court of the United States,

## OCTOBER TERM, 1890.

No. 1739.

IN THE MATTER OF THE APPEAL

OF

JAMES J. SLOCUM.

# BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
*Attorney-General of New York,*
*Of Counsel, Albany, N. Y.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

**No. 1739.**

IN THE MATTER OF THE APPEAL

OF

JAMES J. SLOCUM.

*This is an appeal by James J. Slocum from an order of the Circuit Court of the United States for the Southern District of New York, held in the city of New York on the 12th day of March, 1891, denying the petition of the said Slocum for a writ of habeas corpus, to inquire into the cause of his detention at Sing Sing prison, by Augustus A. Brush, Agent and Warden of said prison.*

## BRIEF FOR AGENT AND WARDEN.

### STATEMENT OF FACTS.

The petitioner, James J. Slocum, by George A. Hooper, his attorney, on the 12th day of March, 1891, presented to the Circuit Court of the United States for the Southern District of New York a petition, signed and verified on that day by said George A. Hooper, praying for a writ of *habeas corpus* to be issued to Augustus A. Brush, Agent and Warden of Sing Sing prison, upon the general ground that the petitioner was said to be "*unlawfully imprisoned and restrained of his liberty, contrary to law and in violation of the Constitution of the United States, by Augustus A. Brush, as Agent and Warden of the State prison at Sing Sing.*"

It is further alleged in said petition:

"II. The facts concerning the detention and the claim or authority, by virtue of which he is so detained, are as follows:

He was convicted of the crime of murder in the first degree in the Court of General Sessions of the Peace, in and for the city and county of New York, on the 21st day of March, 1890, and sentenced upon such conviction to death, under chapter 489 of the Laws of 1888, and committed to the custody of said Brush accordingly.

"III. That when said Slocum was arraigned upon the indictment herein he was without counsel, and without means to employ counsel for his defense. That the judge presiding at said court then asked said Slocum if he desired counsel; and said defendant, then relying upon his constitutional rights, demanded that counsel be assigned to defend him upon said trial as provided by law. That thereupon the said court assigned one John R. Heinzelman as counsel to defend him.

"That said John R. Heinzelman was not then, nor at any time prior or since, an attorney or counselor-at-law; and that he had no right to practice in said Court of General Sessions, nor in the Court of Appeals of said State, in which court he prosecuted the appeal in this case from said Court of General Sessions.

"That by reason of said assignment of a person not an attorney or counselor-at-law the defendant was denied and deprived of his rights under the laws of said State of New York and under the Constitution of the United States, your petitioner, therefore, says that the judgment and sentence in this case is void under the Constitution.

"Your petitioner alleges that the commitment aforesaid and the detention under the conviction and sentence aforesaid and under said indictment are null, void and of no force or validity."

In the affidavit of verification it is stated by Mr. Hooper that he was authorized by the petitioner to make, sign and verify the petition, and that the reason that the same is not verified by the petitioner himself is that "he is in close and solitary confinement at said Sing Sing prison, and that the week fixed for his execution begins on Monday next, March sixteenth, and there is not time, therefore, to have him verify and serve the writ without endangering his life."

The Circuit Court on the 12th of March, 1891, on reading and filing said petition, and after hearing counsel for the said petitioner, "ordered, that the prayer of said petitioner be, and the same hereby is, in all things denied." On the same day an appeal was taken from the said order to the Supreme Court of the United States, and on the same day a citation issued returnable on the 23d day of March, 1891. This court has since made an order directing that this case be docketed, and the same set down for argument for the 11th day of May, 1891.

# POINTS.

## I.

The petition was not signed by the petitioner or verified by him, and, therefore, no proof was adduced before the Circuit Court sufficient to confer upon it jurisdiction to issue the writ. Section 754, Revised Statutes, expressly provides that the application for the writ shall be "*by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority if known. The facts set forth in the complaint should be verified by the oath of the person making the application.*"

## II.

Section 753 of the Revised Statutes provides "the writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof; *or is in custody in violation of the Constitution or of a law or treaty of the United States.*" * * *

By sections 763 and 764 of the Revised Statutes it is provided that an appeal may be taken from the final decision of the Circuit Court to the Supreme Court "*in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.*"

The petition herein does not show that the petitioner is in custody or restrained of his liberty in violation of the Federal Constitution, or of any law or treaty of the United States. (Ex parte Dorr, 3 How., 103; In re Burrus, 136 U. S., 591.) In this last case Mr. Justice Miller, writing the opinion of the court, said: "It is not now the law, and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of *habeas corpus*. In order to obtain the benefit of this writ, and to procure its being issued by the court or justice or judge who has a right to order its issue, it

should be made to appear upon the application of the writ *that it is founded upon some matter which justifies the exercise of Federal authority, and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States.*"

It is perfectly clear that the general allegation in the petition, that the petitioner is "*unlawfully imprisoned and restrained of his liberty contrary to law and in violation of the Constitution of the United States,*" is not sufficient as an allegation or statement of fact concerning the detention of the petitioner in jail, to show that he comes within the exception of section 753 of the Revised Statutes cited. In construing section 641 of the Revised Statutes, which declares that "when any civil or criminal prosecution is commenced in any State court for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in any part of the State where such suit or prosecution is pending, any rights secured to him by any law providing for the equal rights of citizens of the United States * * * such suit or prosecution may * * * be removed for trial into the next Circuit Court to be held in the district where it is pending." This court said: "*So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions could be retained in a State court for insufficient allegations when the accused imagined he would gain by the removal.*" (See Virginia v. Rives, 100 U. S., 332.)

And so "*The general averment, in the petition, that he was detained in violation of the Constitution and laws of the United States, and that the District Court had no jurisdiction or authority to try and sentence him, in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment.*" (In re Cuddy, Petitioner, 131 U. S., 280, 286.)

The remaining allegations of the petition are equally insufficient to show that the petitioner is restrained of his liberty for any violation by the State authorities of the Federal Constitution or of the laws and treaties of the United States.

## III.

The only provision of the Federal Constitution which bears upon the question of the right of a defendant to have the assistance of counsel is that contained in article 6 of the amendments to the Constitution, and is as follows: "*In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, * * * and to have the assistance of counsel for his defense.*" But it is well settled that this amendment was not intended to limit the power of the State government, and had operation only upon the national government. (See Spies v. Illinois, 123 U. S., 166; In re Kemmler, 136 U. S., 436.)

It is also to be noticed in this connection that while the Constitution cited undoubtedly secures to the defendant in the Federal courts the right "*to have the assistance of counsel for his defense,*" there is nothing compulsory upon the courts to assign counsel. The same provision, in substance, is contained in the Constitution of the State of New York. See section 6 of article 1, which provides "*and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.*" It was never claimed that this provision of the Constitution *compelled* the assignment of counsel. And it was not until the enactment of section 308 of the Code of Criminal Procedure that the State of New York made it obligatory that the court should assign counsel. This section reads as follows: "*If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel.*" It will be noticed in this case also that it is alleged in the petition that the above provision was complied with by the court. It is impertinent to any inquiry here that Heinzelman was not an attorney or counselor-at-law. In conclusion upon this branch of the case, it may be said that neither the Federal Constitution, nor the Federal statutes, nor the Constitution of the State of New York, requires the assignment of counsel, and it is only in the case where on the arraignment of a defendant on a criminal prosecution the Court is required to assign counsel, and that only in a case where he appears without counsel and requests the assignment of counsel. (See People v. Supervisors of Albany Co., 28 How, Pr. 22; approved in principle by Court of Appeals. See People v. Supervisors of Niagara Co., 78 N. Y., 622.)

## IV.

There is no allegation in the petition that the petitioner in any manner or form ever objected, in court or out of court, to the appearance of Heinzelman in his behalf, or has ever attempted in any way to raise that question in the State courts, either by motion for a new trial, arrest of judgment or appeal.

It is not apparent how the petitioner can now raise this question in this court in a collateral way by attempting to turn the writ of *habeas corpus* into a writ of error. If the court before whom this prisoner was tried "*had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further.*" (Ex parte Yarbrough, 110 U. S., 653; and see In re Coy, 127 id., 759; Stephens v. Fuller, 136 id., 447.)

## V.

By section 504 of the Code of Criminal Procedure, "upon the defendant being brought before the court *it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant*," *etc.* If the objection now made by the petitioner was valid in law, it was the duty of the court, by the above section, to have sustained it. And refusing so to do, the defendant could have appealed to the highest court of the State, and if any Federal question was involved, ultimately he could have appealed to this court. (Bush v. Kentucky, 107 U. S., 119.)

## VI.

If it could be in any way held that the privilege or right of the assignment of counsel was secured by a constitutional provision, Federal or State, then it is claimed that the petitioner has waived his privilege.

The rule is well settled that "one may waive constitutional provisions intended for his benefit." And the highest court in the State of New York has sustained that proposition in the case of Pierson, Plaintiff in Error, v. The People, Defendants in Error (79 N. Y., 424). In this case Pierson was indicted for murder and upon the trial challenged the array of jurors, but afterwards, the court having sustained the challenge withdrew it and the trial pro-